Filed 4/5/04 P. v. Shepeard CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ROY SHEPEARD, Defendant and Appellant.	C043108 (Super. Ct. No. NCR59347)

Defendant Steven Roy Shepeard was found during a traffic stop to have methamphetamine in his pocket. Defendant thereafter pleaded guilty to transporting methamphetamine, in violation of Health and Safety Code section 11379, subdivision (a).

Sentenced in accordance with his plea bargain agreement, defendant appeals. He contends defense counsel was ineffective for failing to argue his entitlement to presentence credits, and the trial court erred in imposing a drug program fee (Health & Saf. Code, § 11372.7).

The first contention is meritless. The latter contention is properly conceded by the Attorney General; accordingly, we shall order the abstract of judgment modified to delete the drug program fee and otherwise affirm the judgment.

BACKGROUND

According to the probation report, defendant was on parole from an unidentified offense at the time of his arrest in this case on October 15, 2002. Responding to a report of a possibly intoxicated or sleepy driver, Red Bluff police conducted a traffic stop. Defendant did not seem impaired, but he falsely denied being a parolee, and had no driver's license. After defendant ignored police directions to keep his hands out of his pockets, police conducted a pat down search in which methamphetamine was found.

At the time of his arrest on charges he transported and possessed methamphetamine, a parole hold was put on defendant for violation of his parole by (1) driving without a license, (2) falsely identifying himself to police, (3) traveling without permission more than 50 miles from the place of his parole, and (4) possessing and transporting a controlled substance. Defendant remained in custody between the time of his arrest and his sentencing in this case on January 13, 2003.

The probation report recommended defendant receive no presentence custody credit in connection with his plea bargain in the instant case, because "the parole hold includes a violation unrelated to the present matter."

At sentencing, the trial court announced that defendant "was not entitled to credits due to his parole hold." Asked if she had "[a]ny disagreement with that," defense counsel said "No, Your Honor. That appears correct."

DISCUSSION

I. Defense Counsel Was Not Ineffective For Failing to Argue Defendant's Entitlement to Presentence Conduct Credits

On appeal, defendant contends his counsel "was simply ineffective for conceding" that he is entitled to no presentence custody credit against his sentence in this case. In defendant's view, defense counsel should have "rais[ed] the *Atiles/Rojas*[1] exception to the presentence credits question."[2]

He is mistaken.

To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that

---

1 *In re Atiles* (1983) 33 Cal.3d 805 and *In re Rojas* (1979) 23 Cal.3d 152.

2 Penal Code section 1237.1 prohibits a defendant from taking an appeal from a judgment of conviction on the ground of an error in the calculation of presentence custody credits unless the error is first presented in the trial court as directed. But in *People v. Acosta* (1996) 48 Cal.App.4th 411, an appellate court held: "[S]ection 1237.1 only applies when the sole issue raised on appeal involves a criminal defendant's contention that there was a miscalculation of presentence credits. In other words, section 1237.1 does not require a motion be filed in the trial court as a precondition to litigating the amount of presentence credits when there are other issues raised on direct appeal." (*Id.* at p. 420; accord, *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Duran* (1998) 67 Cal.App.4th 267, 270.) This court may resolve the credit issue since it not the sole issue raised on appeal.

counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693]; *People v. Waidla* (2000) 22 Cal.4th 690, 718.)

Defendant cannot meet the first prong of this test. Defense counsel's decision not to argue defendant's entitlement to presentence credit in this matter based on *In re Atiles, supra,* 33 Cal.3d 805 or *In re Rojas, supra*, 23 Cal.3d 152 in fact reflects a correct understanding of the current case authority and, thus, cannot constitute ineffective assistance.

Penal Code section 2900.5 provides that the total number of days a defendant spends in custody, either before sentencing or as a condition of probation, "shall be credited" against the defendant's "term of imprisonment." Thus, a convicted person shall receive credit against his sentence for all days spent in custody, including presentence custody (subd. (a)), but "only where the custody to be credited is *attributable to proceedings related to the same conduct* for which the defendant has been convicted" (subd. (b), italics added).

"[T]he purpose of [Penal Code] section 2900.5 is to ensure that one held in pretrial custody on the basis of unproven criminal charges will not serve a longer overall period of confinement upon a subsequent conviction than another person who received an identical sentence but did not suffer preconviction

custody." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183-1184.) But "difficult problems arise when, as often happens, the custody for which credit is sought had multiple, unrelated causes" (*People v. Bruner, supra,* 9 Cal.4th at p. 1180) and there exists "the possibility of *duplicate credit* that might create a windfall for the defendant." (*In re Marquez* (2003) 30 Cal.4th 14, 23, italics in original; *People v. Bruner, supra,* 9 Cal.4th at p. 1180.)[3]

To address defendant's contention on appeal that his counsel was ineffective for failing to urge the court to follow a particular "line" of authority, we must briefly summarize the evolution of the California Supreme Court's interpretation of Penal Code section 2900.5, subdivision (b), in this "multiple-cause presentence restraint" context. (See *People v. Bruner, supra,* 9 Cal.4th at pp. 1183-1193.)

More than 20 years ago, in *In re Rojas, supra*, 23 Cal.3d 152, the court denied a request for presentence custody credits by a petitioner who had been serving a prison term for manslaughter when he was charged with an unrelated murder committed prior to the manslaughter conviction, and subsequently sought credit against the new murder sentence for the period

---

[3] Although the record before us does not indicate definitively that defendant has received credit for his presentence custody against his parole revocation term, Title 15 of the California Code of Regulations, section 2635.1, subdivision (c), expressly mandates that confinement pursuant to a parole hold be credited to a subsequent revocation term. (See *People v. Bruner, supra,* 9 Cal.4th at p. 1181, fn. 1.)

spent in county jail awaiting resolution of the murder case. (*In re Rojas, supra,* 23 Cal.3d at pp. 154-156.) "There is no reason in law or logic to extend the protection intended to be afforded one merely *charged* with a crime to one already incarcerated and serving his sentence for a first offense who is then charged with a *second* crime. As to the latter individual the deprivation of liberty for which he seeks credit cannot be attributed to the second offense." (*Id.* at p. 156, italics in original.) In so doing, the court rejected the notion that presentence custody credit must invariably be awarded in any and all proceedings that had any relationship to a period of custody for which credit is sought, disapproving appellate court rulings that a defendant must receive credit for jail time awaiting disposition of criminal proceedings even if he is simultaneously serving a prison sentence for another offense. (*Id.* at p. 157; see also *People v. Bruner, supra,* 9 Cal.4th at pp. 1184-1185.)

Thereafter, in *In re Atiles, supra,* 33 Cal.3d 805, the court *did* allow presentence credit in facts similar to those before us. The petitioner in *Atiles* sought credit against his sentence in a new criminal case for time spent in custody on a parole hold and parole revocation term. (*Id.* at pp. 807-808.) The court reasoned: "In determining whether custody for which credit is sought under section 2900.5 is 'attributable to proceedings leading to the conviction,' the sentencing court *is not required to eliminate all other possible bases* for the defendant's presentence incarceration. The court need only determine that the defendant was not *already serving* a term for

an unrelated offense when restraints related to the new charge were imposed on him, and the conduct related to the new charge is *a basis* for those restraints." (*Id.* at p. 810, italics added.) Dual credit is appropriate under the facts of *Atiles*, the court held, because "[t]he conduct which led to [the defendant's] arrest and conviction on the new criminal charge also formed a basis for the parole hold and subsequent revocation proceedings[,] . . . . his custody in the county jail was, literally, 'attributable to proceedings related to the same conduct for which the defendant has been convicted' (§ 2900.5, subd. (b))" (*id.* at pp. 809-810). The court distinguished *Rojas,* in which the petitioner was already incarcerated for an unrelated crime when charged, convicted, and sentenced on new charges (*id.* at p. 808).

Atiles, however, is no longer good law.

In *In re Joyner* (1989) 48 Cal.3d 487, the court denied a petitioner's request for credit against his California sentence for the time spent in pretrial detention in Florida. Rejecting the petitioner's suggestion that, under *Atiles*, presentence custody must be credited against any and all sentences for any conduct which was "a" basis, even if not the only basis, for the presentence confinement (*id.* at pp. 493-494), the court in *Joyner* held that "a period of time previously credited against a sentence for unrelated offenses cannot be deemed 'attributable to proceedings' resulting in a later-imposed sentence unless it is demonstrated that the claimant would have been at liberty during the period were it not for a restraint relating to the

proceedings resulting in the later sentence. In other words, duplicative credits against separately imposed concurrent sentences for unrelated offenses will be granted only on a showing of *strict causation*." (*Id.* at p. 489, italics added.)

Defendant correctly notes that our high court in "*Joyner* stopped short of overruling *Atiles* expressly." (*People v. Bruner, supra,* 9 Cal.4th at p. 1190.) But he ignores that the court *has* subsequently expressly overruled *Atiles*'s interpretation of section 2900.5, subdivision (b), in *People v. Bruner, supra,* 9 Cal.4th 1178. (See *id.* at p. 1194.)

In *Bruner*, the defendant was arrested for three parole violations: absconding from parole supervision, theft of a credit card, and cocaine use based on a positive urine test. (9 Cal.4th at p. 1181.) During the search incident to the defendant's arrest, officers found cocaine on his person. Although he was initially cited for possession and released on his own recognizance, the defendant in *Bruner* remained in custody pursuant to the parole hold and, on the basis of the three earlier parole violations as well as the cocaine possession, his parole was revoked and he was sentenced to a 12-month term. While serving the parole revocation term, the defendant was charged with cocaine possession, pleaded guilty, and was sentenced to 16 months in prison. (*Ibid.*) He then sought credit against his drug sentence for time already served on the parole revocation.

The high court in *Bruner* held that because the defendant's presentence custody stemmed from multiple, unrelated incidents

of misconduct, he could not establish that "but for" the criminal charge he would have been free; accordingly, his presentence custody could not be credited against a subsequent term of incarceration. (9 Cal.4th at p. 1192.) In so doing, the *Bruner* court analyzed section 2900.5, subdivision (b), and opined -- consistent with *In re Rojas, supra,* 23 Cal.3d 152 and *In re Joyner, supra,* 48 Cal.3d 487 -- that "where a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a 'but for' cause of the earlier restraint. Accordingly, when one seeks credit upon a criminal sentence for presentence time already served and credited on a parole or probation revocation term, he cannot prevail simply by demonstrating that the misconduct which led to his conviction and sentence was 'a' basis for the revocation matter as well." (9 Cal.4th at pp. 1193-1194 ["To the extent *Atiles* reaches a contrary conclusion, we overrule that decision"].)

In so doing, *Bruner* approved of a number of decisions which reasoned that "a prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the *sole reason* for his loss of liberty during the presentence period" and his "criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based *only in part* upon the same criminal episode." (*People v.*

Bruner, supra, 9 Cal.4th at p. 1191, first italics added, second italics in original; citing *People v. Wiley* (1994) 25 Cal.App.4th 159, 165-166; *People v. Purvis* (1992) 11 Cal.App.4th 1193, 1196-1198; *In re Bustos* (1992) 4 Cal.App.4th 851, 855; *In re Nickles* (1991) 231 Cal.App.3d 415, 423-424.)

To the extent he suggests *Bruner* and *Atiles* represent independently functioning lines of authority, defendant ignores that *Bruner* has both expressly overruled *Atiles*, and expressly rejected the notion that *Atiles* remains viable, or "continues to operate in its own sphere," or "still governs situations where conduct leading to the current sentence was involved, whether to a greater or lesser degree, in each of the 'proceedings' which contributed to the presentence restraint." (*People v. Bruner*, *supra*, 9 Cal.4th at p. 1191, italics omitted.) Defense counsel's refusal to argue overruled case authority is laudable, not ineffective assistance of counsel.

Moreover, substantial evidence supports the trial court's determination that defendant failed to meet his burden to establish entitlement to presentence custody credit. (See *People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258.) He cannot establish that, but for the present drug charges, he would not have been charged with parole violations and would have been free. Such a conclusion would, in fact, be unsupported by evidence or reason, in view of the fact that the other three grounds for parole revocation included such serious matters as absconding and falsely identifying himself to police. In the absence of an affirmative indication to the contrary, we must

conclude that defendant would have been confined for these other parole violations regardless of the present offenses.

II. The Abstract of Judgment Should Be Amended to Strike the Drug Program Fee

The abstract of judgment reflects that the trial court imposed a $270 drug program fee pursuant to Health and Safety Code section 11372.7. In fact, neither the court's oral pronouncement of judgment and sentence nor the clerk's minute order of the imposition of judgment reflects that fact.

Defendant contends the abstract of judgment must be amended to eliminate the drug program fee. The Attorney General concedes the argument.

We agree. The court's oral pronouncement of judgment controls; the abstract of judgment may not add to, or modify the judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

Moreover, although Health and Safety Code section 11372.7, subdivision (a), requires the court to impose "a drug program fee in an amount not to exceed one hundred fifty dollars ($150) for each separate offense," subdivision (b) of that section states that "[i]f the court determines that the person does not have the ability to pay a drug program fee, the person shall not be required to pay a drug program fee." Where, as here, the court does not impose the drug program fee, we presume the court resolved those issues in favor of the defendant. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516-1519; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413, fn. 2.)

For these reasons, the abstract must be corrected to delete this fee.

DISPOSITION

The judgment is modified to delete the $270 drug program fee. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment showing the modification, and shall forward a certified copy of the same to the Department of Corrections.

NICHOLSON, J.

We concur:

SCOTLAND, P.J.

ROBIE, J.